

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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RODNEY MCFARLAND,

Petitioner,

v.

ROBERT A. KIRKPATRICK,

Respondent.

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**ORDER**

08-CV-0065A(M)

This petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 was stayed, upon petitioner's request, so that petitioner could commence state court proceedings in order to exhaust his state judicial remedies with respect to the following unexhausted claims raised in the petition: ¶22A, "Brady Violation-Prosecutorial Misconduct: Statement of Niecy McWilliams; ¶22F, "Newly Discovered Evidence;" Affidavit of Turemail McCullough; and ¶22G, "Ineffective Assistance of Counsel." August 22, 2008 Decision and Order [7].<sup>1</sup> Petitioner was advised that as a condition of the stay he had to commence state judicial proceedings within 30 days of the Order and return to this Court within 30 days of the completion of any state judicial proceedings commenced. Id.

Petitioner was later directed to advise the Court of the status of any state court proceedings he may have commenced in compliance with the Court's Order [8] and petitioner, by an attorney who has not appeared for petitioner in this matter, had advised the Court intermittently of the status of a state court motion to vacate petitioner's conviction, pursuant to New York Criminal Procedure Law, §440.10, that had been filed in County Court. The last

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<sup>1</sup> Bracketed references are to the CM/ECF docket entries.


update was dated December 7, 2011, and advised the Court that, as of July 11, 2011, petitioner's motion for leave to appeal the County Court's decision denying petitioner's §440.10 motion had been granted by the Appellate Division, Fourth Department and that petitioner was awaiting the assignment of counsel for the appeal [14].

Accordingly, petitioner is hereby ordered to advise the Court in writing by **May 18, 2013**, of the status of his appeal from the order denying his §440.10 motion and any further proceedings relating to said motion. If petitioner fails to comply with the Order by **May 18, 2013**, the Court will direct service of the petition upon respondent and an answer to the petition. Further, if petitioner does not respond to his Order as directed, the three unexhausted claims that were dismissed without prejudice will remain dismissed without prejudice and petitioner may later be barred from bringing them again, either in this matter or a later filed petition for a writ of habeas corpus, either because they may be untimely, *see* 28 U.S.C. §2244(d)(1), or because of the gate-keeping rules regarding successive or second petitions for habeas corpus relief. *See* 28 U.S.C. §2244(b).

In order to advise respondent of the status of this petition, the Clerk of the Court is directed to forward a copy of this Order to the Monroe County District Attorney's Office and the New York State Attorney General's Office, Federal Habeas Unit, 120 Broadway, 12th Floor, New York, New York 10271-0332.

**SO ORDERED.**

DATED: April 19, 2013

  
JEREMIAH J. MCCARTHY  
United States Magistrate Judge